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No. 94-297

In The

Supreme Court of the United States

October Term, 1994

BRIAN M. PURICELLI,

Petitioner,

vs.

MORRISVILLE BOROUGH, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I. Counterstatement of the Case 1

II. Summary of the Argument 4

III. Argument 6

TABLE OF CITATIONS

Page

CASES

Department of Justice v. Reporters Comm., 489 U.S. 749, 103 L.Ed. 2d 774, 109 S.Ct. 1468 (1989)..... 8

Mullen v. Borough of Parkesburg, 132 Pa. Commonwealth Ct. 321, 572 A.2d 859 (1990)..... 11

Paul v. Davis, 424 U.S. 693, 47 L.Ed. 2d 455, 96 S.Ct. 1155 (1976).....4, 6, 7, 8

Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3rd Cir. 1991), *cert. denied*, 112 S.Ct. 1171 (1992)..... 8

UNITED STATES CONSTITUTION

U.S. Const. Amend. I.....5, 9

U.S. Const. Amend. IV 5, 9

U.S. Const. Amend. XIV 5

STATUTES

Freedom of Information Act, 5 U.S.C. § 552.....4, 8

Police Tenure Act of June 15, 1951, P.L. 586, 53 P.S. § 811 *et seq*..... 11

I. COUNTERSTATEMENT OF THE CASE

In February of 1984, Petitioner, Brian M. Puricelli (hereinafter "Puricelli"), was hired by Wrightstown Township as a part-time police officer. He was not required to take a civil service examination before his employment with the Township commenced. Thus, he never acquired civil service status, and he was both scheduled and paid on an hourly basis. In 1987, Puricelli was hired as a part-time police officer by the Borough of Yardley, and he remained employed by that Borough's police department until July 12, 1989.

In September, 1988, Puricelli left the Wrightstown Township Police Department to become a full-time law student at the Thomas Cooley Law School in Lansing, Michigan. Puricelli continued to attend law school as a full-time student until 1991, when he graduated with a juris doctor degree. Effective December 31, 1988, the Township of Wrightstown disbanded its police department. Thus, Petitioner's claim that he was terminated as a police officer by Wrightstown Township is patently false. Although Petitioner never formally resigned his position, he simply moved out of the Wrightstown area and made himself unavailable to work as a part-time officer while attending law school.

During Petitioner's employment with Wrightstown Township as a part-time police officer, the Chief of Police of Wrightstown Township, Walter Hughes (hereinafter "Hughes"), became aware from the Chief of Police of Yardley Borough that Plaintiff had a criminal record for being arrested for a drug related offense. Chief Hughes learned that this offense had taken place in the State of

Texas, and he contacted law enforcement authorities in the State of Texas and obtained written confirmation that Plaintiff had indeed been arrested for possession with intent to deliver a controlled substance. This information was turned over to the Wrightstown Township commissioners and the Township solicitor, but the decision was made not to take action against Puricelli because there was no indication that Puricelli had ever been convicted of this offense. This episode took place prior to, rather than after, the initiation of the investigation of Puricelli in February of 1988. At no time was Chief Hughes made aware that there was any type of federal court order "sealing" the case records concerning Puricelli's criminal case.

The court order in question was entered on April 14, 1983, by United States District Judge John B. Hannum of the United States District Court for the Eastern District of Pennsylvania in response to Puricelli's motion to expunge his criminal record relating to an arrest in 1976. Judge Hannum's order denied Puricelli's request for expungment, but stated as follows:

> 1. That the FBI remove its records in the criminal action from its central criminal files and place them in a separate storage facility;
>
> 2. That the FBI delete any reference to its records on any criminal or arrest record computer;
>
> 3. That the records not be opened unless the FBI determined that they were needed in the course of a bona fide criminal investigation by law enforcement agencies and only where necessary for that investigation;

4. That the United States not disseminate the records for any purpose other than the ones set forth in the Order; and

5. That the District Court Clerk's office seal the records maintained by that office.

In February of 1988, as the result of a complaint from a citizen who complained about her car being towed, Chief Hughes initiated an investigation of Puricelli's role in authorizing the towing of an unusually large number of vehicles from outside Wrightstown Township into the Township. In each case, the vehicles were being towed to an auto body shop owned by Donald Garner, a close personal friend of Puricelli. Chief Hughes approached both Puricelli and Garner in order to gather more information and to obtain an explanation as to the large number of abandoned vehicles being towed to Garner's auto body shop, but neither Puricelli nor Garner would cooperate or provide any information. Chief Hughes then met with Bucks County Detective William Brosha of the District Attorney's office of Bucks County, which office in turn conducted a preliminary investigation. This investigation was then taken before an investigating grand jury. As the result of the investigating grand jury proceedings, the District Attorney's office eventually determined that there was insufficient evidence to support a criminal conviction of Puricelli, and the investigation was then closed. Puricelli was never arrested, charged with a crime, or prosecuted.

During its investigation of Puricelli, the District Attorney's office of Bucks County contacted the Department of Public Safety in Texas to obtain background information about Puricelli. In response to this request,

the Texas authorities sent information to the District Attorney's office showing that in 1976 Puricelli had been arrested in Texas for possession of marijuana with intent to distribute. Subsequently, the District Attorney's office sought access to the court records pertaining to Puricelli's arrest, but they were denied access pursuant to Judge Hannum's order.

Since graduating from law school, Petitioner is now practicing as an attorney in Bucks County, Pennsylvania. There was no evidence of record that he was denied any law enforcement position because of this episode.

II. SUMMARY OF THE ARGUMENT

Petitioner established nothing more than a defamation claim against Defendants and was unable to meet the "reputation plus" test of *Paul v. Davis*, 424 U.S. 693, 47 L.Ed. 2d 455, 96 S.Ct. 1155 (1976).

Petitioner's claim that Defendants violated his constitutional right of privacy was never properly raised before the Court of Appeals and that court refused to address the issue. In any event, the trial court properly rejected Petitioner's claim on the basis that revelations concerning Puricelli's prior criminal record were matters of public record and were of legitimate concern to the public. The trial court properly concluded that such information is not entitled to privacy protection. The cases cited by Petitioner in his petition deal with requests for information pursuant to the Freedom of Information Act and are inapposite.

At no time before the District Court or the Court of Appeals did Petitioner raise the issue of a First Amendment violation. Thus, any such issue is now waived.

Similarly, Petitioner never raised any Fourth Amendment claim before the Third Circuit Court of Appeals, and this issue should be considered waived.

Petitioner's malicious prosecution/abuse of process claim was never raised before the Court of Appeals and should also be considered waived. Petitioner's claim was properly rejected by the District Court because Petitioner never established that process was ever issued inasmuch as he was never charged with a crime, indicted or arrested. The District Court held that any investigation of Petitioner's suspected criminal activity was insufficient to state a claim for malicious prosecution or abuse of process.

The Court of Appeals correctly affirmed the trial judge's refusal to recuse herself inasmuch as Petitioner's request was not timely, in that it was made only after the trial court ruled on Defendants' Motion for Summary Judgment; it was not properly made, in that it was made by a letter from Petitioner himself to the judge; and it was substantively without merit.

At no time before the District Court or the Court of Appeals did the Petitioner raise the issue of diversity jurisdiction over the pendent state claims. Thus, said issue is waived.

Petitioner's claim concerning a violation of his Fourteenth Amendment right to procedural due process was never properly raised before the Court of Appeals and is

also waived. Furthermore, Petitioner failed to establish that he had a protected property interest in his employment as a part-time police officer.

III. ARGUMENT

Petitioner has failed to cite any of the considerations set forth in Rule 10 of the Supreme Court rules. The decision of the Court of Appeals for the Third Circuit is not in conflict with the decision of any other Court of Appeals nor is it in conflict with the decision of a state court of last resort. The Court of Appeals did not greatly depart from the accepted and usual course of judicial proceedings nor did it sanction such a departure by the District Court in this matter. Instead, the Court of Appeals has merely applied the "reputation plus" test enunciated by this Court in *Paul v. Davis*, 424 U.S. 693 (1976). Thus, there is no reason why this Honorable Court should grant the petition in this matter.

The Petitioner in this matter is rambling, unfocused, and at times incoherent. Thus, providing a meaningful response is difficult, at best. The Court of Appeals was faced with the same difficulty, and in light of Petitioner's blatant disregard of the local rules of the Court of Appeals concerning the contents and length of briefs, it is not surprising that the Court gave Petitioner's arguments short shrift.

Petitioner alleged in this case that Chief Walter Hughes and members of the Bucks County District Attorney's office defamed him by mentioning to various individuals that Petitioner was involved in a chop shop, that Petitioner was the subject of a grand jury investigation,

and that Petitioner had a criminal record. The District Court correctly held that Petitioner was unable to establish any tangible injury such as loss of employment in connection with the defamatory remarks attributed to Chief Hughes and the Bucks County Defendants. Indeed, Petitioner continued to work for Wrightstown Township as a part-time police officer until he voluntarily left for law school in September of 1988. At that time, Petitioner left the eastern Pennsylvania area and moved to Michigan, where he enrolled as a full-time law student at Thomas Cooley Law School in Lansing, Michigan. Shortly thereafter, on December 31, 1988, the police force for Wrightstown Township was disbanded, and police protection for Wrightstown Township was undertaken pursuant to a purchase of service contract with a neighboring municipality. Thus, the trial court correctly held that Petitioner's "claim is nothing more than a state defamation action masquerading as a Section 1983 claim." A.52. The trial court correctly rejected Petitioner's response that Pennsylvania regards reputation as a fundamental interest such that harm to reputation alone constituted a viable claim under Section 1983. Petitioner cites no caselaw from any other Court of Appeals which would dictate a contrary result. Thus, this Honorable Court should refrain from expanding the "reputation plus" test enumerated in *Paul v. Davis, supra,* by eliminating the "plus" element of that test.

The trial court properly dismissed Petitioner's claim that Defendants violated his right to privacy when they revealed that Petitioner was the subject of a grand jury investigation, claimed that he was running a "chop shop"

and stated that he had an arrest record for drug smuggling. As the Court of Appeals correctly noted in its Memorandum Opinion, the court order of Judge Hannum ordering the FBI to remove his criminal record from its criminal files and store it separately and ordering the clerk's office for the Eastern District of Pennsylvania to seal the record in Petitioner's criminal prosecution did not bind any of the Defendants in this matter.

Citing *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, n.5 (3rd Cir. 1991), *cert. denied*, 112 S.Ct. 1171 (1992), the trial court went on to hold that the type of information disclosed was not the type of "private" information protected by the United States Constitution. The trial court correctly noted that the type of information revealed in this case was remarkably similar to the information revealed in *Paul v. Davis, supra*, wherein this Honorable Court held that the plaintiff's claim that disclosure of the fact of his arrest on a shoplifting charge did not give rise to constitutional protection under the "right of privacy" line of cases.

Petitioner cites no authority for his contention that he has a constitutionally protected privacy interest in his criminal history and the grand jury investigation of which he was a subject. The case of *Department of Justice v. Reporters Comm.*, 489 U.S. 749, 103 L.Ed. 2d 774, 109 S.Ct. 1468 (1989), cited by Petitioner, merely stands for the proposition that disclosure of FBI rap sheets to private citizens does not fall within any of the exemptions set forth in the Freedom of Information Act, 5 U.S.C. § 552 in that such a request could be expected to invade a citizen's privacy. Such a holding is not even remotely similar to a

determination that discussions by law enforcement officials concerning the criminal arrest record of the subject of an investigation violate a constitutionally protected right of privacy. Thus, Petitioner has failed to cite any convincing reason for this Court to review the decision of the Court of Appeals on this issue.

With regard to Petitioner's First and Fourth Amendment claims that a criminal investigation was instituted against him as the result of his reports of corruption and wrong doing in the Wrightstown Police Department, those issues were never properly raised before the Court of Appeals. Indeed, the First Amendment claim was not even raised before the District Court. As to the Fourth Amendment claiming the District Court correctly held that since Petitioner was never charged with a crime, indicted or arrested, he failed to state a claim for abuse of process or malicious prosecution. Petitioner argues that the initiation of an investigatory grand jury and the issuance of subpoenas constituted sufficient "process" to constitute an abuse of process; however, Petitioner cites no caselaw in support of that contention. Petitioner seeks to impose a constitutional duty on law enforcement officers to establish probable cause before they can initiate an investigation or take a case before an investigatory grand jury. This is placing the cart before the horse. Such a rule would effectively preclude law enforcement officials from conducting investigations in most cases, since the purpose of an investigation is to make a determination as to whether probable cause for arrest is present against the person being investigated. Most investigations would simply never get off the ground if they required the existence of probable cause prior to initiation. Once

again, Petitioner has cited no caselaw in support of this novel proposition. Thus, this Court should refuse to review this matter further.

Petitioner next argues that the trial judge should have recused herself in this matter. This issue was waived before the trial court in that Petitioner never filed a formal motion seeking recusal, and his request for recusal was not timely. He waited until after the judge ruled on Defendants' Motions for Summary Judgment until he made his request and even then he requested recusal through a letter to the judge rather than by formal motion. Moreover, said request lacked substantive merit. The only basis for Petitioner's request is that Defendant, Alan Rubenstein, who was the District Attorney of Bucks County, had campaigned with the trial judge during her unsuccessful campaign for election to the Pennsylvania Supreme Court, that he had attended several fund raising events on her behalf, and that he had given her a tour of the Bucks County Criminal Justice facilities when the trial judge was sitting as a judge on the Court of Common Pleas of Montgomery County, Pennsylvania. The Third Circuit Court of Appeals found Petitioner's claim "to be plainly without merit." Petitioner has cited nothing in his present petition to disturb that conclusion.

Petitioner argues that the trial court improperly dismissed the pendent state claims inasmuch as Petitioner had established diversity jurisdiction. Once again, this issue was never raised before the trial court nor before the Court of Appeals. Petitioner seeks to raise this issue for the first time before this Court and does so without specifying what state claims he seeks to make. Petitioner

should not be permitted to raise such an argument for the first time at this stage of the litigation.

Finally, Petitioner argues that he held a protectable property right in his employment as a part-time police officer with Wrightstown Township and that he was denied that right without procedural due process. The Court of Appeals correctly concluded that Petitioner held no protectable property interest in his employment under state law. Wrightstown Township, as a second class township under Pennsylvania law, is governed by the Police Tenure Act of June 15, 1951, P.L. 586, 53 P.S. § 811 *et seq.*, which extended civil service protection only to a "regular full-time police officer." 53 P.S. § 812. A regular full-time police officer is defined as one who is "available or on call for duty at any and all times." *Mullen v. Borough of Parkesburg*, 132 Pa. Commonwealth Ct. 321, 572 A.2d 859 (1990). The record in this case reflects that Puricelli was a part-time non-salaried employee who was paid by the hour. At the time of his hire, Petitioner never took nor passed a civil service examination. While employed as a police officer by Wrightstown Township, Petitioner was working concurrently as a part-time police officer with the Borough of Yardley. Thus, the record is clear that Petitioner was not available for duty at any and all times with Wrightstown Township and could not be classified as a regular full-time police officer. Moreover, the record is clear that Wrightstown Township did not terminate Petitioner's employment. To the contrary, Petitioner left the employment of the Township to enroll as a full-time law student in the State of Michigan. Several months later, the police force for Wrightstown Township was disbanded, and all police officers, including the Chief of

Police, were laid off. Since Petitioner voluntarily left the employ of Wrightstown Township, process was due. Thus, the Court of Appeals properly concluded that Petitioner had failed to establish a due process claim.

In conclusion, Petitioner has set forth no compelling reason why this Court should grant his petition in this case. Petitioner has not demonstrated that the decision of the Court of Appeals in this matter is at odds with decisions of other courts of appeal or of any state courts. Instead, Petitioner makes a rambling and disjointed argument that the Court of Appeals incorrectly decided his appeal and, therefore, he is entitled to further review by this Court. Petitioner includes arguments not properly raised before the trial court or the Court of Appeals, he asks this Court to ignore his failure to abide by the Rules of Civil Procedure and local rules before the trial court and the Court of Appeals, and he repeatedly misstates the facts contained in the record. Respondent respectfully suggests that this Honorable Court not waste its resources on a case with so little merit as this one. Accordingly, Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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